

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2007-000525

06/20/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

SEVEN SPRINGS INVESTMENTS L L C

DAVID A RUBIN

v.

MARICOPA COUNTY

DOMINGOS R SANTOS

UNDER ADVISEMENT RULING

(Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction)

In this case, the question is whether the metered postmark date of September 24, 2007 is the date of mailing. State law does not expressly answer the question. That there may be a discrepancy between the meter date and the actual date of mailing is recognized by A.R.S. § 28-5720(C): "If a mailing date is affixed to the envelope by a machine owned or under the control of the person submitting the report and the United States post office has corrected or changed the date stamped on the envelope by causing the official United States post office postmark to also be imprinted on the envelope, the date shown by the official United States post office postmark shall be the accepted date, if different from the original postmark." Here, however, the Postal Service did not imprint its own postmark. Thus, the only evidence of the date of mailing is the meter date. Plaintiff offers as controverting evidence Mr. Bien-Willner's avowal that he did not receive the Notice of Decision until November 13, 2007, 49 days later. Assuming this to be true, it still does not establish the actual date of mailing. Given that the burden of proof is on the party asserting that jurisdiction exists, *Ringling Bros. & Barnum & Bailey Combined Shows, Inc. v. Superior Court*, 140 Ariz. 38, 42 (App. 1983), this showing is inadequate.

The Court is sensitive to the due process implications arising where appeal is prevented by lack of timely actual notice. But such is not the situation here. Mr. Bien-Willner received the notice, by his own account, on November 13. It appears that he assumed that the decision had been reached a few days earlier, even though the mailing date on the envelope was September

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24. The timetable would have been tight, but there would still have been more than a week to file an appeal.

Therefore, IT IS ORDERED Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction is granted.